

Legal fundamentals

- 2.1 Introduction**
- 2.3 The common law and judicial review**
- 2.10 International human rights conventions**
 - 2.10 European Convention on Human Rights
Overview • Article 3 • Article 8 • Article 5
 - 2.22 Other key conventions: children and disability
UN Convention on the Rights of the Child • UN Convention on the Rights of Persons with Disabilities
- 2.38 The hierarchy of domestic law**
- 2.45 Powers and duties**
- 2.50 Key local structures/processes**
- 2.58 ‘Parental responsibility’**
- 2.63 Routes to redress**

Key points

- There is a wide range of domestic (UK) and international sources of law creating powers and duties in relation to disabled children.
- These powers and duties are influenced by an expanding range of international human rights conventions affecting disabled children.
- The extent to which services *must* be provided to disabled children will depend on whether there is a 'specific' or 'general' duty to do so.
- Where a public body has a power to provide services (rather than a duty to do so), that power must be exercised fairly, rationally and reasonably.
- Since the Children Act 2004, services for children (health, education, social care) are becoming more integrated.
- In particular, all the relevant agencies now have additional duties to co-operate to improve the well-being of all children (including disabled children).
- However, important separate legal duties remain in relation to children's services, education and health (see chapters 3, 4 and 5 respectively).
- Where agencies are or may be in breach of their duties, routes to redress include complaints processes, specialist tribunals and (where the problem is sufficiently serious and urgent) judicial review in the High Court (see chapter 11).
- Funding through legal aid may be available for children and families when a legal challenge becomes necessary (see chapter 11).

Introduction

- 2.1 There is a wide and expanding range of domestic and international sources of law affecting disabled children and their families, much of which has come into force in the last twenty years. This chapter describes in outline terms the different sources of law and considers some of the most important powers and duties on public bodies (these are set out in more detail in the succeeding chapters). It explores the distinction between duties (things public bodies have to do) and powers (things public bodies may do) and considers how the legal structures of the agencies providing services to disabled chil-

dren and their families are changing, in many cases bringing agencies closer together. Finally, it considers the different routes to redress for children and families who have been denied the services and support they need, including the potential for legal aid funding for some of these challenges – issues explored more fully in chapter 11.

- 2.2 In recent years, and most notably through the Human Rights Act (HRA) 1998, international human rights law has become as important a source of law for disabled children and their families as domestic legislation, regulations and statutory guidance. Each of these sources of law is explored in turn below.

The common law and judicial review

- 2.3 A distinctive feature of our legal system is the ‘common law’, being the law developed by judges through the decisions in court. It is a particular feature of the English legal system that any gaps left by legislation can be filled by the courts. The role of the common law is to ensure that the law reflects the standards of our society – and so it can evolve over time as social standards shift.

- 2.4 While the debate on the potential repeal of the HRA 1998 has been less prominent in recent years (see para 2.10 below), it is nevertheless important that common law rights are widely understood. Indeed the Supreme Court has emphasised that the first place to look to identify rights should be domestic law, including the common law, rather than the European Convention on Human Rights (ECHR).¹

- 2.5 The most important common law rights for disabled children, young people and families will be the rights that can be enforced through judicial review (see chapter 11 below at paras 11.92–11.106). In short, judicial review is the process by which the courts assess the lawfulness of the actions and decisions of public bodies. In *Council of Civil Service Unions v Minister for the Civil Service*,² Lord Diplock clearly outlined the classification of the grounds of judicial review:

- **Illegality:** Acting outside statutory powers or in breach of a statutory duty.

1 *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115 at [54]–[57].

2 [1985] AC 374.

- **Irrationality:** Failing to take relevant matters into account, considering irrelevant matters, acting ‘unreasonably’.³
- **Procedural impropriety:** Acting unfairly, breaching a legitimate expectation, actual or apparent bias.

2.6 As a shorthand, it can be said that public bodies are required by the common law to act rationally, reasonably and fairly in everything they do. However, these categories are not fixed in stone, and indeed the grounds of judicial review often merge into one another.⁴

2.7 A further important ground of challenge has arisen with the arrival in English law of EU and human rights principles. This is proportionality, which requires that decisions⁵ pursue legitimate aims to which they are rationally connected and that a ‘fair balance’ is struck between the interests of the individual and those of the wider community.⁶ Where there is a human rights issue in the case, proportionality is often the most powerful ground of review of any judicial review ground because it requires the most intense focus on the decision and its consequences. Whether proportionality is also a legitimate ground of review in relation to common law or statutory rights not protected by the ECHR is the subject of ongoing debate.⁷

2.8 Some of the most important grounds of challenge to public law decision-making in the social welfare field (other than proportionality) are:

- **Failure to follow the policy and objects of a statutory power:** This is the *Padfield* principle.⁸ So for example, the purpose of Part III of the Children Act 1989 is that ‘local authorities should provide support

3 The bar for ‘unreasonable’ decision-making is set high – to be unlawful on this basis a decision would generally have to be so unreasonable that no reasonable decision-maker would take it. This is known as ‘*Wednesbury* unreasonableness’ from the leading case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

4 See *Boddington v British Transport Police* [1999] 2 AC 143 at 152E–F for some examples of grounds which can fit into different categories.

5 *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 WLR 1622.

6 See *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167 and *Bank Mellat v HM Treasury* [2013] UKSC 39; [2014] AC 700 for the principles of proportionality.

7 See *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591; and *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69.

8 From the leading case of *Padfield v Ministry of Agriculture, Fisheries and Food* [1968] AC 997.

for children and families'.⁹ Everything done under this Part of the Children Act 1989 should further this purpose (see chapter 3).

- **Failure to take all relevant matters into account:** Often referred to as *Tameside* irrationality.¹⁰ A good example of this principle in action comes from the judgment of the Court of Appeal in *R v Ealing LBC ex p C*.¹¹ In that case, the local authority had failed to carry out a sufficiently detailed assessment of the needs of a disabled boy, in particular his need for suitable accommodation. The Court of Appeal held that 'Important practical problems were simply not addressed' in the decision-making. Lord Justice Judge concluded as follows:

In my judgment, both the decision and the decision making process were flawed. Unless the repetition of an assertion is to be regarded as a proper manifestation of a reasoning process, there was none here. Certainly there was no analysis of the accommodation problems faced by this disabled boy and his mother and his brother. The decision is therefore susceptible to judicial review on the basis that it is unreasonable in the *Wednesbury* sense. To adapt Lord Diplock's observation in *Tameside*:

'Did the council ask themselves the right question and take reasonable steps to acquaint themselves with the relevant information to enable them to answer it correctly?'

The answer to the first is no: the right question or questions were not asked. The answer to the second question equally is no: reasonable steps were not taken by the council to enable the question to be answered correctly.¹²

- **Fettering of discretion:** A term which continues to strike fear into the hearts of many council officers and other public officials. The basic principle is that public bodies must not operate an inflexible policy but must always give consideration to exercising their powers; see *R (Lumba) v Secretary of State for the Home Department*.¹³ It is essential that policies governing statutory powers do not automatically determine the outcome; see *R v Hampshire CC ex p W*.¹⁴

⁹ See *R (M) v Gateshead MBC* [2006] EWCA Civ 221; [2006] QB 650 at [42].

¹⁰ From the leading case of *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014.

¹¹ (2000) 3 CCLR 122.

¹² Judgment at 130F-I.

¹³ [2011] UKSC 12; [2012] 1 AC 245 per Lord Dyson at [21]: 'It is a well established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of decision-makers'.

¹⁴ [1994] ELR 460 per Sedley J.

- 2.9 Another key common law right for disabled children, young people and families is the right to a fair consultation; see chapter 1 at paras 1.22–1.25 generally on the importance of proper consultation in this area. The requirement on public bodies to consult fairly is an aspect of the common law duty of procedural fairness. It is now well understood¹⁵ that a fair consultation requires the following:
- Consultation must take place at a ‘formative stage’, ie sufficiently early in the decision-making to influence the outcome.
 - The public body must provide ‘sufficient reasons for any proposal to permit of intelligent consideration and response’.
 - ‘Adequate time’ has to be allowed for consideration and response by consultees – with what is ‘adequate’ depending on all the circumstances. For example, while a six-week consultation period may generally be ‘adequate’, this may not apply if the six weeks ran over the school summer holidays and the issue affected disabled children and their families.
 - The public body must ensure that the outcome of the consultation is ‘conscientiously taken into account’ in the final decision. However, consultation is not negotiation and providing the public body gives rational reasons it may proceed with a decision even if the majority of consultees disagree.

International human rights conventions

European Convention on Human Rights

Overview

- 2.10 For the purposes of this book, the most important human rights convention is the ECHR, because it has been incorporated into UK domestic law through the HRA 1998. Before the HRA 1998 came into force in 2000, individuals who felt that their ECHR rights had not been respected had to go to the European Court of Human Rights (ECtHR) in Strasbourg, a lengthy and time-consuming process. Now, cases alleging breaches of ECHR rights are routinely dealt with by the domestic courts. Although recent governments have expressed their intentions to repeal the HRA 1998, at the time of writing (October 2019) no proposed legislation has been published and it is

¹⁵ See *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213; (1999) 2 CCLR 285 approved by the Supreme Court in *R (Moseley) v Haringey LBC* [2014] UKSC 56; [2014] 1 WLR 3947.

far from certain that any such legislation will be approved by parliament – particularly if it breaks the link with the ECHR. Until parliament repeals or amends the HRA 1998, it retains its full effect.

- 2.11 Several articles of the ECHR are of relevance to disabled children and their families, of which the most important is undoubtedly Article 8, the right to respect for family, home and private life. The following section considers this article – as well as Articles 3 and 5, which are also of importance in certain situations. Article 2, the duty to protect life, is not considered separately, but much of the analysis concerning Article 3 (below) applies with even greater force to situations where there are arguable grounds that the state might have been culpable (by neglect or otherwise) in a death.¹⁶

Article 3

- 2.12 Article 3 places a duty on public bodies to take action to ensure that no one is subjected to torture, inhuman or degrading treatment. If a state official (for example a police or prison officer) subjects someone to seriously unpleasant treatment, this could amount to a violation of the duty under Article 3. However, the same may occur if the state fails to take action to prevent such treatment occurring (even if the perpetrator is not a state official) since there is a ‘positive obligation on states to ensure (so far as they are able) that no-one suffers from torture, inhuman or degrading treatment’. Accordingly, if the criminal justice system fails to punish the perpetrators of unlawful violence, this may amount to a violation.¹⁷ For example in *R (B) v DPP*,¹⁸ a decision by the Crown Prosecution Service (CPS) not to prosecute (simply because the victim had mental health problems) was held to constitute ‘degrading treatment of the victim’ contrary to Article 3.
- 2.13 *Dordević v Croatia*¹⁹ concerned the harassment by school children of someone with learning disabilities and his mother, with whom he lived. The harassment included shouting obscenities, spitting,

16 See, for example, *Edwards v UK* App No 46477/99, 14 March 2002.

17 See, for example *Atalay v Turkey* (2008) App No 1249/03, 18 December 2008.

18 [2009] EWHC 106 (Admin).

19 (2012) 16 CCLR 657; see also *Commissioner of Police of the Metropolis v DSD and others* [2015] EWCA Civ 646, affirmed by the Supreme Court in [2018] UKSC 11, where the Court of Appeal considered the extent of the ‘positive obligation’ to investigate such – suggesting that there is ‘a sliding scale: from deliberate torture by State officials to the consequences of negligence by non-State agents’ – with the state having a greater ‘margin of appreciation’ as to the action it takes at the ‘bottom of the scale’ than at the top: judgment at [45].

pushing him against an iron fence, hitting him with a ball and on one occasion burning him with a cigarette. The police and authorities were aware of this harassment but took no effective action, and this failure was held to amount to a violation of the positive obligation under Article 3.

Article 8

2.14 Article 8 protects a person's family life, private life, home and correspondence. Article 8 is what is termed a 'qualified' right. By this it is meant that although the state (for example a local authority, the police, etc) should not generally interfere with a person's privacy, their family life or their home, there may be situations where this is permitted (for example if a child is being abused or a home is being used for illegal purposes). The ECHR, however, stipulates that any such interference with this right must be (among other things) 'proportionate' – or perhaps rather must not be 'disproportionate'. For example, in *Kutzner v Germany*,²⁰ two sisters were taken into care because the parents had learning disabilities. The court held that this was a 'disproportionate' interference with the Article 8 right to family life because, before taking this action, the government had failed to consider providing extra support to the family to enable them to remain living together.

2.15 The courts have given a very broad meaning to the idea of 'private life'. They have held it to encompass not only the idea of having one's privacy respected – but also the notion of one's identity; one's 'ability to function socially';²¹ one's 'physical and psychological integrity';²² and of the right to develop one's personality and one's relations with other human beings 'without outside interference'.²³ Action (or inaction) by the state that may make a person unwell (for example through pollution²⁴) will, therefore, engage the Article 8 right as may a refusal to allow access to a person's social services file – if that contains information about his or her childhood (ie their 'identity').²⁵ The court has also held that creating barriers which restrict a disabled person's freedom of movement may also interfere with a person's

20 (2002) 35 EHRR 25.

21 *R (Razgar) v Secretary of State for the Home Department (No 2)* [2004] 2 AC 368 per Lord Bingham at [9].

22 *Pretty v UK* (2002) 35 EHRR 1.

23 *Botta v Italy* (1998) 26 EHRR 241.

24 *Hatton v UK* (2003) App No 36022/97.

25 *Gaskin v UK* (1989) 12 EHRR 36.

Article 8 rights (the right to develop relations with one's environment/other people).²⁶ In this latter context, it has been argued that an understanding of the nature of this right has, for disabled people, become aligned with many of the concepts associated with the 'social model' of disability (see paras 1.7–1.8).²⁷

2.16 Article 8 places both a 'negative' and a 'positive' obligation on the state. The negative obligation is that the state must not interfere with the rights protected by Article 8 unless it is pursuing one of the specified legitimate aims and even then it must not act in a disproportionate way – so the interference must be no more than strictly necessary. An example of a 'negative' interference would be taking away someone's home, or removing someone's children into care. However, the state also has 'positive' obligations to take action in some cases – most obviously to protect those who are in some way at risk of abuse. In *Đorđević v Croatia*²⁸ (considered above at para 2.13), it was not only the person with learning disabilities who was harassed by the school children: his mother (his carer) also suffered because she witnessed what was being done to her son and the ECtHR held that this amounted to a violation of her right to family life (to 'dignity and the quality of life') under Article 8.

2.17 The positive obligations under the ECHR extend not merely to protecting vulnerable people from harm and prosecuting their abusers. There is also in certain circumstances a positive obligation on the state to take action to ensure the fulfilment of Article 8 rights. For example, where a child's welfare is at stake, 'article 8 may require the provision of welfare support in a manner which enables family life to continue'.²⁹ Article 8 may also require states to take action to 'ameliorate and compensate' for the restrictions that disabled people experience – as Judge Greve of the ECtHR held in *Price v UK*:

In a civilised country like the United Kingdom, society considers it not only appropriate but a basic humane concern to try to improve and compensate for the disabilities faced by a person in the applicant's situation. In my opinion, these compensatory measures come to form part of the disabled person's physical integrity.³⁰

26 *Botta v Italy* (1998) 26 EHRR 241.

27 L Clements and J Read, 'The dog that didn't bark', in L Lawson and C Gooding (eds), *Disability rights in Europe: from theory to practice*, Hart Publishing, 2005.

28 App No 41526/10, 24 July 2012; (2012) 15 CCLR 657.

29 *Anufrijeva v Southwark LBC* [2004] QB 1124 per Lord Woolf at [43].

30 (2002) 34 EHRR 1285: a case that concerned Article 3 – ie, the right not to be subjected to 'degrading treatment'.

- 2.18 It has been held that the ‘very essence of the Convention is respect for human dignity’³¹ and with this understanding comes an obligation on public bodies to ensure that the supports made available to disabled people ensure they are not left in squalid or undignified circumstances. In *R (Bernard) v Enfield LBC*,³² for example, the court found a violation of Article 8 through the delay in provision of proper toileting – holding that providing accessible toileting facilities to a disabled woman ‘would have restored her dignity as a human being’. Similarly, in *R (A, B, X and Y) v East Sussex CC and the Disability Rights Commission (No 2)*, Munby J (as he then was) held that the:

Recognition and protection of human dignity is one of the core values – in truth the core value – of our society and, indeed, of all the societies which are part of the European family of nations and which have embraced the principles of the Convention.³³

- 2.19 While the courts will scrutinise carefully any failure of a public body to treat an individual with appropriate ‘dignity’, they are very aware (some might say, ‘too aware’) of the fact that public bodies have limited financial resources. Accordingly, where the body has considered all the relevant factors and acted within the law, the courts are reluctant to interfere with their decisions as to what is an appropriate level of support for a particular individual.³⁴

Article 5

- 2.20 A further ECHR right which has taken on increasing prominence in the disability sphere is Article 5. Article 5 severely limits the situations in which people can be deprived of their liberty and imposes strict procedural rules on public bodies whenever they seek to deprive someone of their liberty. The court has held that a person is ‘deprived of their liberty’ if they are subject to continuous supervision and control and are not free to leave, there is no valid consent and the state has responsibility for the deprivation.³⁵ The strictness of the requirements of Article 5 mean that even if it is thought to be in a

31 *Pretty v UK* (2002) 35 EHRR 1 at [65].

32 [2002] EWHC 2282 (Admin); (2002) 5 CCLR 577 at [33].

33 [2003] EWHC 167 (Admin); (2003) 6 CCLR 194 at [86].

34 See, for example, *McDonald v UK* (2015) 60 EHRR 1; (2014) 17 CCLR 187 where the ECtHR reiterated that its policy was to give ‘a wide margin of appreciation’ to individual states in relation to the reasonableness of such policies – but see also L Clements (ed), ‘Disability, Dignity and the Cri de Coeur’, [2011] *EHRLR Special Disability Rights Issue*, pp675–685.

35 *P v Cheshire West and Chester Council* [2014] UKSC 19; (2014) 17 CCLR 5.

disabled person's best interests to be 'subject to continuous supervision and not free to leave' – this must be justified by independent evidence and scrutiny.

- 2.21 The process for authorising the detention of disabled children/young people can be complex. If the child is 'accommodated' and has a history of absconding, then in certain situations the local authority can place them in secure accommodation with the approval of a court (Children Act 1989 s25). In some situations, a child or young person can be detained ('sectioned') under the Mental Health Act 1983 and, in some further situations, where the child lacks the necessary mental capacity to choose where they want to live, their detention can be approved by virtue of the provisions in the Mental Capacity Act 2005 if aged 16 or over.³⁶ If under 16, then their deprivation may have to be approved by the High Court – although in certain situations it appears that it is possible for the child's parents to give consent to the placement.³⁷ This is a complex area of law, full consideration of which lies outside the scope of this book – but it is explored further in chapter 7 at paras 7.49–7.51.

Other key conventions: children and disability

- 2.22 Alongside the ECHR, two other international human rights conventions are of direct relevance to disabled children. These are:
- UN Convention on the Rights of the Child (UNCRC); and
 - UN Convention on the Rights of Persons with Disabilities (UNCRPD).

There is now a widely recognised requirement that the ECHR rights should be read in 'harmony' with the other international conventions, meaning that a breach of one of the rights contained in the international conventions may well result in a breach of the ECHR,

36 Reforms to this complex and unsatisfactory scheme will be introduced by the Mental Capacity (Amendment) Act 2019, which received royal assent on 16 May 2019. It is expected that the new 'liberty protection safeguards' system will replace the old 'deprivation of liberty safeguards' regime in October 2020.

37 *Re D (a child) (deprivation of liberty: parental responsibility)*; [2015] EWHC 922 (Fam); [2015] Fam Law 636: a controversial decision which has been partially overturned by the Supreme Court ([2019] UKSC 42). The court held that it is not within the scope of parental responsibility to consent to a placement depriving their 16 or 17-year-old child of their liberty. The Supreme Court did not consider the position of children under 16 and so Keehan J's conclusion that parental agreement can operate to prevent a confinement being a deprivation of liberty in relation to those under 16 remains good law. See discussion in chapter 7 at paras 7.52–7.57 and box 3 p.362.

which would be unlawful under the HRA 1998.³⁸ The international conventions should also inform how the courts interpret any domestic laws that are ambiguous.

UN Convention on the Rights of the Child

- 2.23 The UNCRC is the most widely ratified of the UN conventions and is, therefore, as close as possible to a universally agreed international human rights treaty. Although the UNCRC is not part of English law (it has not been ‘incorporated’ in the way that the HRA 1998 ‘incorporated’ the ECHR), its provisions are subject to what is known as an ‘interpretative obligation’. This means that English law must be interpreted as far as possible so as to give it a meaning that does not conflict with the requirements of the UNCRC (or indeed any other international treaty the UK has ratified – for example the UNCRPD considered below.³⁹ In a 2006 judgment, Baroness Hale explained this idea (in the UK context) in the following terms:

Even if an international treaty has not been incorporated into domestic law, our domestic legislation has to be construed so far as possible so as to comply with the international obligations which we have undertaken. When two interpretations of these regulations are possible, the interpretation chosen should be that which better complies with the commitment to the welfare of children which this country has made by ratifying the United Nations Convention on the Rights of the Child.⁴⁰

- 2.24 In 2015, the Supreme Court reiterated this principle.⁴¹ Lord Reed, for example, asserted that:

It is not in dispute that the Convention rights protected in our domestic law by the Human Rights Act can also be interpreted in the light of international treaties, such as the UNCRC, that are applicable in the particular sphere.⁴²

- 2.25 Articles in the UNCRC of particular relevance to disabled children include:

38 See *Neulinger v Switzerland* (2010) 28 BHRC 706 and see discussion by Lord Wilson in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47 at [41]–[45].

39 See, for example, *Mabon v Mabon* [2005] EWCA Civ 634; (2005) 8 CCLR 412.

40 *Smith v Smith and another* [2006] UKHL 35; [2006] 1 WLR 2024 at [78].

41 *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449 and see for example S Broach, ‘Enforcing human rights – what the *Benefit Cap* judgment means for future cases’ on the ‘RightsinReality’ blog.

42 *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; (2015) 18 CCLR 412 at para 83.

- Article 2: non-discrimination.
 - Article 3: the best interests of the child to be a primary consideration.⁴³ This article has been the subject of significant litigation. In 2011, the Supreme Court referred to the central importance of ‘best interests’ and whilst it accepted that this was not without limits, it considered that it ‘must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them’.⁴⁴
 - Article 4: states to use the ‘maximum extent’ of available resources to realise children’s economic, social and cultural rights.
 - Article 12: the right to participation.
 - Article 24: the right to the ‘highest attainable standard of health’.
- 2.26 Article 23 of the UNCRC relates specifically to disabled children. It requires states to recognise that disabled children should enjoy ‘full and decent’ lives. It further recognises the right of disabled children to ‘special care’. Such support is to be provided to disabled children free of charge where possible, subject to resources. The aim of such support should be to allow every child to achieve ‘the fullest possible social integration and individual development’.
- 2.27 The UN Committee that oversees the UNCRC (like all other such UN treaty committees) from time to time issues advice (known as ‘General Comments’) on the way the convention should be interpreted. In its General Comment No 9, for example, it stressed the particular importance of the requirement in Article 23 that a child with disability and her or his parents and/or others caring for the child receive ‘special care and assistance’ and noted that this support should be ‘free of charge whenever possible’.

UN Convention on the Rights of Persons with Disabilities

- 2.28 The UK ratified the UNCRPD in 2009. In accordance with the general principles discussed above, the rights enshrined in the UNCRPD should be taken into account when interpreting domestic

43 See UN Committee on the Rights of the Child, *General comment No 14 on the right of the child to have his or her best interests taken as a primary consideration*, May 2013 for more on UNCRC Article 3.

44 Lord Kerr’s judgment in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166 – and see also *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449.

law or European law and the ECtHR has itself recognised that the UNCRPD is an important reference point for the interpretation of ECHR Article 8.⁴⁵ The Court of Appeal has said that the UNCRPD has the potential to ‘illuminate’ the approach to discrimination and justification under ECHR Article 14.⁴⁶

2.29 Important articles in the UNCRPD for disabled children include:

- Article 3: general principles, including ‘respect for inherent dignity’ and ‘full and effective participation and inclusion in society’.
- Article 9: accessibility.
- Article 19: independent living and inclusion in the community.

2.30 As with the UNCRC, there is a specific article in the UNCRPD (Article 7) relating to disabled children. Article 7(1) requires states to:

Take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

2.31 Article 7(2) reinforces the UNCRC Article 3 requirement that in all actions concerning a disabled child, the child’s best interests shall be a primary consideration.⁴⁷ Similarly, Article 7(3) reinforces the right to participation under UNCRC Article 12, requiring states to provide ‘disability and age-appropriate assistance’ to help disabled children realise this right.

2.32 Furthermore, Article 23(3) specifically requires that disabled children have equal rights in respect of family life, and requires states to provide ‘early and comprehensive information, services and support’ to prevent ‘concealment, abandonment, neglect and segregation’ of disabled children. Under Article 23(5), where the immediate family is unable to care for a disabled child, the state must make ‘every effort’ to find alternative care within the wider family or in a family setting in the community.

2.33 Article 24 of the UNCRPD concerns education. In particular, it requires states to establish an ‘inclusive education system’. Disabled people have a right to be educated ‘on an equal basis with others in the communities in which they live’: Article 24(2)(b).

45 See *Glor v Switzerland*, App No 13444/04, 30 April 2009; and *Alajos Kiss v Hungary*, App No 38832/06, 20 May 2010.

46 *Burnip v Birmingham CC* [2012] EWCA Civ 629; [2013] PTSR 117 at [22].

47 A breach of both UNCRPD Article 7(2) and UNCRC Article 3 was found by the Supreme Court in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47.

- 2.34 The UK government has entered a reservation to Article 24 in relation to residential education⁴⁸ in the following terms:
 The United Kingdom reserves the right for disabled children to be educated outside their local community where more appropriate education provision is available elsewhere. Nevertheless, parents of disabled children have the same opportunity as other parents to state a preference for the school at which they wish their child to be educated.⁴⁹
- 2.35 The UK government has also made a declaration in relation to Article 24 to provide a definition of the meaning of ‘inclusion’:
 The United Kingdom Government is committed to continuing to develop an inclusive system where parents of disabled children have increasing access to mainstream schools and staff, which have the capacity to meet the needs of disabled children.
 The General Education System in the United Kingdom includes mainstream and special schools, which the UK Government understands is allowed under the Convention.⁵⁰
- 2.36 This declaration reflects the government’s position that the law relating to special educational needs, now in Part 3 of the Children and Families Act 2014, establishes an ‘inclusive education system’ while preserving a role for special schools to meet the needs of children with more complex needs. This question is further considered at paras 1.68–1.71 and more fully in chapter 4.
- 2.37 The UK has also ratified the Optional Protocol to the UNCRPD, which permits individuals and groups to petition the UN Disability Committee in Geneva where there are alleged violations of rights protected by the UNCRPD. As is normal with international conventions, there is a prior requirement to exhaust domestic remedies before sending a ‘communication’ to the Disability Committee.⁵¹ However, this still raises the prospect that where the rights enshrined in the UNCRPD are not incorporated into domestic law and cannot properly be read into the ECHR, then a remedy may be obtained through the Disability Committee.

48 The issue of residential special school provision is discussed further at paras 1.86–1.88 and 4.187–4.191.

49 Accessible at: www.un.org/disabilities/default.asp?id=475.

50 Accessible at: www.un.org/disabilities/default.asp?id=475.

51 Optional Protocol, Article 2(d).

The hierarchy of domestic law

- 2.38 The legal regime relating to the rights of disabled children is made up of three categories aside from the common law (see paras 2.3–2.9 above). The first and most important are the relatively few statutes (known also as ‘Acts’ and as ‘primary legislation’). These spell out the basic rights and duties: the Children Act 1989 being a prominent example. Second, beneath the layer of primary legislation lie an extensive range of ‘subordinate’ or ‘secondary legislation’, often labelled regulations, orders and rules. Primary and secondary legislation are ‘law’ because they have both been approved by parliament.
- 2.39 Statutes or ‘primary’ legislation are the most important of our ‘laws’ – and the role of the courts is to interpret the intention of parliament when enacting these laws and to give effect to their ordinary meaning: but also, in doing so, to endeavour to interpret them in a way that does not conflict with international human rights standards. Subordinate or secondary legislation (for example, the Special Educational Needs and Disability Regulations 2014⁵²) has the same legal force as primary statutes. These rules and regulations are made under a specific statute by the relevant government minister and are subject to approval by parliament. Rules and regulations will normally go into more detail than the statute under which they are made, prescribing such matters as processes to be followed, timescales and so on.
- 2.40 The third and final category of the legal regime is guidance, which is, essentially, advice issued by government to explain what the law requires and to suggest how it may be complied with. Unlike the law (which we must all obey), guidance does not have to be followed slavishly if there are good reasons to depart from it. Problematically, however, some guidance is more binding than other guidance.
- 2.41 Guidance that carries the label ‘statutory guidance’ or ‘Code of Practice’ have for various legal reasons much more force – indeed they are often referred to as ‘binding’ on the public bodies to which they are addressed. *Working together to safeguard children* (July 2018) is an example of statutory guidance and is referred to extensively in chapter 3. At page 7 of the guidance, it states that it is ‘issued under section 7 of the Local Authority Social Services Act 1970, which requires local authorities in their social services functions to act under the general guidance of the Secretary of State’. In *R v Islington*

52 SI No 1530.

LBC ex p Rixon,⁵³ the court set out precisely what local authorities have to do with guidance issued under section 7 of the 1970 Act:

Parliament in enacting s7(1) did not intend local authorities to whom ministerial guidance was given to be free, having considered it, to take it or leave it . . . Parliament by s7(1) has required local authorities to follow the path charted by the Secretary of State's guidance, with liberty to deviate from it where the local authority judges on admissible grounds that there *is* good reason to do so, but without freedom to take a substantially different course.

2.42 More recently, in *R (TG) v Lambeth LBC*,⁵⁴ the Court of Appeal said that:

It is inaccurate to describe guidance given under section 7 of the 1970 Act . . . as apt to be followed 'probably' or only 'as a matter of good practice'. In the absence of a considered decision that there is good reason to deviate from it, it *must* be followed⁵⁵ [emphasis as original].

2.43 It is often in statutory guidance that we find the most important duties in relation to disabled children – for instance, the duty to assess social care needs and produce a plan to show how those needs will be met under Children Act 1989 s17.⁵⁶ Very similar considerations apply to codes of practice issued by the government – of which the most obvious example is the *Special educational needs and disability code of practice* which is referred to extensively in chapter 4. On page 1 of the code, it states 'the guidance in this code must be considered and that those who have regard to it will be expected to explain any departure from it'. This is a less binding form of guidance than guidance such as *Working together* which public bodies are required to 'act under' – but nonetheless guidance to which public bodies must 'have regard' has always to be considered.

2.44 Where government issues 'practice guidance', for instance the short breaks practice guidance (see paras 3.95–3.97), it is less coercive and public bodies have more freedom to deviate from it – where they have sound reasons for so doing. Nevertheless, the advice it contains is something that must be taken into account when that body makes a decision and if the decision is at significant variance from the approach required in the guidance, the courts may (in the absence of compelling reasons to the contrary) be prepared to find

53 (1997–98) 1 CCLR 119 at [123].

54 [2011] EWCA Civ 526; (2011) 14 CCLR 366.

55 Judgment at [17].

56 HM Government, *Working Together*, 2018.

the decision to be made unlawfully.⁵⁷ In *R (Ali) v Newham LBC*,⁵⁸ the court held that in the circumstances of that case non-statutory guidance on tactile paving for people with visual impairments had to be followed and it was unlawful for the local authority to depart from it.⁵⁹

Powers and duties

- 2.45 Public bodies such as local authorities are ‘creatures of statute’. This means that they can only do things that they are permitted or required to do by Acts of Parliament and secondary legislation. There is, however, an important broad power in Localism Act 2011 s1, which gives local authorities ‘power to do anything that individuals generally may do’ (described as a ‘general power of competence’).
- 2.46 This section looks at the different types of duties and powers, because understanding how these duties and powers operate is critical to determining whether disabled children and families have an entitlement to a particular service or benefit. In general terms, ‘a power need not be exercised, but a duty must be discharged’,⁶⁰ but as is set out below the nature of an individual power or duty is often much more subtle and nuanced.
- 2.47 First, legislation frequently places mandatory duties on public bodies, signified by the use of language such as ‘shall’ and ‘must’. Some of the things parliament requires public bodies to do are expressed as ‘specific’ duties; a key example of this is Children Act 1989 s20(1), which requires local authorities to provide accommodation to *every* child who meets the qualifying criteria. Where a specific duty arises, it is appropriate to speak of the child as having a ‘right’ to a service.
- 2.48 Other duties are expressed in more general terms; for instance, Children Act 1989 s17(1), which creates a general duty to assess and

57 *R v Islington LBC ex p Rixon* (1997–98) 1 CCLR 119 at 131E.

58 [2012] EWHC 2970 (Admin); (2012) 15 CCLR 715.

59 At [39], the court referred to the following factors as influencing whether non-statutory guidance must be followed: ‘the authorship of the guidance, the quality and intensity of the work done in the production of the guidance, the extent to which the (possibly competing) interests of those who are likely to be affected by the guidance have been recognised and weighed, the importance of any more general public policy that the guidance has sought to promote, and the express terms of the guidance itself’.

60 *R (G) v Barnet LBC* [2003] UKHL 57; (2003) 6 CCLR 500 per Lord Nicholls at [12].

provide services for children ‘in need’ (see chapter 3). This duty has been held by the courts not to be owed to each individual child in need but generally to all children in need in the local authority’s area.⁶¹ Therefore, a child in need cannot rely on section 17 alone to claim a right to a service, although this right may be found in other legislation (see paras 3.51–3.78). General duties are also often described as ‘target’ duties,⁶² meaning that parliament has set local authorities a ‘target’ but has not intended a failure to meet that target to give rise to a legal challenge for an individual aggrieved person. Target duties cannot be ignored and a public authority must ‘do its best’⁶³ to achieve compliance with the duty in every individual case.

2.49 When an Act or regulation uses the word ‘may’ or ‘can’ (rather than ‘must’ or shall’), it gives the public body a ‘power’ to act but not a ‘duty’. An example is the power to make direct payments in relation to special educational provision considered in chapter 4 at paras 4.181–4.183. No individual can claim a right to a service which a public body only has a power to provide. However, public bodies must exercise their powers rationally, reasonably and fairly and it may be that certain powers have to be exercised in certain situations, including to avoid a breach of a person’s human rights (for example, the power for local authorities to accommodate families together under Children Act 1989 s17(6) if the family are homeless and cannot access other accommodation by reason of their immigration status⁶⁴). What public bodies cannot do is to decide never to use a power, or decide only to use it in a specific way: this is known, in legal jargon, as ‘fettering a discretion’; see para 2.8 above. So if parliament has given a public body a power to do something, then each time the opportunity arises when it could use this power, it must consider whether or not to exercise it. The public body cannot decide never to use the power, or never to use it for the benefit of certain groups of people, for to do so would be to act against the will of parliament. See further the discussion of these requirements, which stem from the ‘common law’, at paras 2.3–2.9 above.

61 *R (G) v Barnet LBC* [2003] UKHL 57; [2004] 2 AC 208.

62 C Callaghan, ‘What is a “target duty”?’ (2000) 5 *Judicial Review*, pp184–187.

63 *R v Radio Authority ex p Bull* [1998] QB 294 at 309. See *R (West) v Rhondda Cynan Taff CBC* [2014] EWHC 2134 (Admin); [2014] ELR 396 for breaches of general duties in relation to nursery education for young children.

64 See *R (Clue) v Birmingham CC* [2010] EWCA Civ 460; (2010) 13 CCLR 276.

Key local structures/processes

2.50 The basic structure of the agencies responsible for delivering services to children and families was set in place by the Children Act 2004. In particular, the Children Act 2004 created:

- A Children's Commissioner for England, whose primary function is 'promoting and protecting the rights of children in England'.⁶⁵
- Lead Members for Children's Services: elected councillors in every children's services authority with direct responsibility for children's services, reporting to the council leader.⁶⁶
- Directors of Children's Services: senior officers with management responsibility for all children's services, including education and children's social services.⁶⁷

2.51 Since the 2010 general election, there has been a rolling back of some of the requirements initially imposed by the Children Act 2004. For instance, the regulations requiring the production of a children and young people's plan have been revoked.⁶⁸ Although the statutory duty on local authorities to establish a Children's Trust Board remains in force,⁶⁹ there is no longer any statutory guidance on how this duty should be exercised.

2.52 Chapter 1 has described the difficulties that families have in finding their way around complex services that do not co-operate effectively with one another: see paras 1.48–1.52. While the importance of effective collaboration between different services has long been recognised, research and official reports testify to the fact that it has proved difficult to achieve.⁷⁰ In an attempt to deal with this problem, the Children Act 2004 imposed important interlocking duties on relevant agencies to safeguard and promote the well-being of children. Under Children Act 2004 s10, each children's services authority is required to make arrangements to co-operate with its relevant partners. The list of relevant partners is extensive and includes all the relevant health agencies, the youth offending team

65 Children Act 2004 s2(1) as amended by Children and Families Act 2014 s107.

66 Children Act 2004 s19.

67 Children Act 2004 s18.

68 See the Children's Trust Board (Children and Young People's Plan) (England) (Revocation) Regulations 2010 SI No 2129. However, a number of local authorities have chosen to retain their plans on a voluntary basis.

69 Children Act 2004 s12A.

70 Audit Commission, *Services for disabled children: a review of services for disabled children and their families*, Audit Commission Publications, 2003.

(YOT) and education institutions. Relevant partners are required to co-operate with the authority in the making of these arrangements and the aim of these arrangements must be to improve the well-being of children in terms of the five ‘Every Child Matters’ outcomes.⁷¹

2.53 The authority and its relevant partners are each required by Children Act 2004 s11 to make arrangements to ensure that ‘their functions are discharged having regard to the need to safeguard and promote the welfare of children’.⁷² This convoluted wording has some similarities to the general equality duty under the Equality Act 2010: see paras 9.99–9.122. What it means in practice is that in carrying out any functions, whether at a strategic or an individual case level,⁷³ public bodies such as local authorities and clinical commissioning groups (CCGs) must do so having regard to the need to promote children’s welfare. Any agency taking a decision not to provide services to an individual disabled child or to tighten eligibility to services generally must be able to show how such a decision fits with this duty.

2.54 The Supreme Court has held⁷⁴ that the Children Act 2004 s11 duty translates the spirit of Article 3 of the UNCRC into domestic law – the requirement to treat children’s best interests as a primary consideration in all decisions affecting them (see para 2.25 above). In *R (B) v Barnet LBC*,⁷⁵ the local authority was held to have breached the Children Act 2004 s11 duty in relation to its treatment of a severely disabled child with inappropriately sexualised behaviour. The requirements of Children Act 2004 s11 were summarised by Lady Hale in *Nzolameso v Westminster City Council*⁷⁶ as follows:

The decision-maker should identify the principal needs of the children, both individually and collectively, and have regard to the need to safeguard and promote them when making the decision.⁷⁷

71 Children Act 2004 s10(2).

72 Children Act 2004 s11(2), see paras 3.49 and 3.60. The education functions of a children’s services authority are excluded from the Children Act 2004 s11 duty, because this duty is mirrored in relation to those functions by Education Act 2002 s175.

73 See *Nzolameso v Westminster City Council* [2015] UKSC 22; (2015) 18 CCLR 201 at [24] for the application of the Children Act 2004 s11 duty both at the policy or strategic level and in individual cases.

74 *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166 per Lady Hale at [23].

75 [2009] EWHC 2842 (Admin); (2009) 12 CCLR 679.

76 [2015] UKSC 22; [2015] 2 All ER 942.

77 Judgment at [27].

- 2.55 The Children Act 2004 builds on the existing co-operation duty in Children Act 1989 s27, which is specific to individual cases. It enables local authorities who need co-operation from a partner agency (for example, an NHS or housing authority) to request help and it places a duty on the partner agency to comply with the request provided it is 'compatible with [the bodies'] . . . statutory or other duties and obligations and does not unduly prejudice the discharge of any of their functions'.
- 2.56 The Health and Social Care Act (HSCA) 2012 introduced important reforms to the operation of the NHS nationally and locally. These are considered in more detail in chapter 5. An obvious change was the transformation of primary care trusts (PCTs) into CCGs.⁷⁸ The HSCA 2012 also created the NHS Commissioning Board,⁷⁹ known as 'NHS England', which has responsibility for commissioning certain specialist services for disabled children. Health and Wellbeing Boards⁸⁰ (HWBs) operate jointly across local authorities and CCGs and are responsible for the production of joint health and wellbeing strategies⁸¹ to inform commissioning decisions.
- 2.57 The HSCA 2012 also established Healthwatch England⁸² and a network of local Healthwatch⁸³ organisations.⁸⁴ The remit of Healthwatch covers the breadth of health and social care services children and young people might use. Healthwatch has the power to give advice to the secretary of state, local authorities and NHS England. It can also undertake special inquiries or projects to look at potential systemic failures in more detail. Local Healthwatch has the power to conduct 'Enter and Views' in health settings to speak to children and young people using the service and observe policies and practices.⁸⁵ This power is not available in relation to children's social care settings.⁸⁶

78 HSCA 2012 s10.

79 HSCA 2012 s9.

80 HSCA 2012 s194.

81 HSCA 2012 s193.

82 HSCA 2012 s181.

83 HSCA 2012 ss182–189.

84 See Healthwatch, *Healthwatch, children and young people: An overview of the network and the role of Healthwatch England*; and Healthwatch, *Healthwatch, children and young people: The role of local Healthwatch* (both November 2014).

85 HSCA 2012 s186.

86 Local Authorities (Public Health Functions and Entry to Premises by Local Healthwatch Representatives) Regulations 2013 S1 No 351 reg 11.

‘Parental responsibility’

- 2.58 A number of the rights and duties covered in this handbook are affected by the concept of ‘parental responsibility’ – see for example the duty to accommodate children under Children Act 1989 s20(1)⁸⁷ or the rights in relation to certain mental health treatment.⁸⁸
- 2.59 ‘Parental responsibility’ is defined in Children Act 1989 s3(1), referring to ‘all the rights, duties, powers, responsibilities and authority which by law the parent of a child has in relation to the child and his property’. The basic principles governing who has parental responsibility are:
- Where a child’s father and mother were married to each other at the time of the birth, each have parental responsibility automatically.⁸⁹
 - Where a child’s father and mother were not married to each other at the time of his birth:
 - the mother has parental responsibility automatically; and
 - the father has parental responsibility if he acquires and does not lose it under the Children Act 1989 (see below).⁹⁰
- 2.60 Specific provisions apply to govern other situations, for example women in civil partnerships or married to another woman at the time of treatment for assisted reproduction.⁹¹
- 2.61 Fathers who were not married to a child’s mother at the time of the child’s birth can gain parental responsibility in the various ways specified in Children Act 1989 s4.⁹² Unmarried fathers can now most simply acquire parental responsibility for their children born after 1 December 2003 by registering themselves as the father on their child’s birth certificate.
- 2.62 Local authorities can obtain parental responsibility for a child through a court order in family proceedings. Special guardians⁹³ will also have parental responsibility; while this will be shared with the

87 See chapter 3 at paras 3.136–3.144.

88 See chapter 5 at para 5.132.

89 Children Act 1989 s2(1).

90 Children Act 1989 s2(2).

91 Children Act 1989 s2(1A) and Human Fertilisation and Embryology Act 2008 s42.

92 See also Children Act 1989 s4ZA for acquisition of parental responsibility by a second female parent and s4A for acquisition of parental responsibility by a step-parent.

93 See Children Act 1989 s14A–14G.

parents the special guardian is entitled to exercise parental responsibility to their exclusion other than in certain specified circumstances.⁹⁴

Routes to redress

- 2.63 This chapter of the first edition of this Handbook provided guidance on routes to redress, including judicial review, complaints procedures and the tribunal. These issues, along with the availability of legal aid, are now covered in more detail in chapter 11 on remedies.

⁹⁴ See Children Act 1989 s14C(1).